Supreme Court, U.S.
FILED
OCT 27 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1978

No. 78-710

ALLEN KLEIN,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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TABLE OF CONTENTS

	PAGE
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Constitutional Provision Involved	3
Statement of the Case	4
The Decision Below	8
Reasons for Granting the Writ	10
I—The Opinion Below Is in Conflict With Decisions of This Court and of Various Circuits in Failing to Distinguish Between a Mistrial Declared Over a Defendant's Objection and One Declared Without Such Objection	12
II—The Decision Below, in Upholding the Discharge of the Jury Over Defendant's Objection and Despite the Express Statement of Some Jurors (and Other Circumstances Indicating) That Continued Deliberations Could Result in a Verdict, Failed to Comprehend This Court's Meaning in Requiring That a Jury Not Be Discharged Unless It Is *Genuinely* Deadlocked and Conflicts With Decisions of That and Other Courts	18
III—The Holding Below That a Mistrial Can Be Declared Without Utilizing Reasonable Alternatives Proposed by Defendant Is Erroneous and Conflicts With Prior Decisions	21
Conclusion	24

APPENDIX

	PAGE
Opinion of the Court of Appeals	1a
Order Denying Petition for Rehearing	26a
Order Denying Rehearing *In Banc*	27a
Order Denying Motion to Stay the Mandate	28a
Opinion of the District Court [442 F. Supp. 1164]	29a
Opinion of the District Court Granting Reargument	36a

TABLE OF AUTHORITIES

	PAGE
Cases:	
Allen v. United States, 164 U.S. 492 (1896)	6, 7, 9, 12, 21, 22
Arizona v. Washington, 434 U.S. 497 (1978)	9, 10, 11, 17, 18, 23
Downum v. United States, 372 U.S. 734 (1963)	17
Dunkerley v. Hogan, 579 F.2d 141 (2d Cir. 1978)	23
Fulwood v. United States, 369 F.2d 960 (D.C.Cir. 1966), *cert. denied,* 387 U.S. 934 (1967)	22n
People ex rel. Luetje v. Ketcham, 45 Misc. 2d 802, 257 N.Y.S.2d 681 (Sup. Ct. Nassau Co. 1965)	20
People v. Munguia, 33 Ill. App. 3d 880, 338 N.E.2d 574 (1975)	21n
People ex rel. Stabile v. Warden, 202 N.Y. 138 (1911)	20, 21n
State Mutual Life Assurance Co. v. Arthur Andersen & Co., 71 Civ. 4036 (S.D.N.Y. 1977)	19n, 21n
State v. Rudolph, 332 So.2d 806 (La.), *cert. denied,* 429 U.S. 982 (1976)	21n
United States ex rel. Anthony v. Sielaff, 552 F.2d 588 (7th Cir. 1977)	20, 21n
United States v. Beckerman, 516 F.2d 905 (2d Cir. 1975)	20
United States v. Evers, 569 F.2d 876 (5th Cir. 1978)	15, 23
United States v. Goldstein, 479 F.2d 1061 (2d Cir.), *cert. denied,* 414 U.S. 873 (1973)	20, 21n
United States v. Gordy, 526 F.2d 631 (5th Cir. 1976)	15
United States v. Grasso, 552 F.2d 46 (2d Cir. 1977), *vacated and remanded,* 98 S.Ct. 3117 (1978)	14, 15, 23
United States v. Horn, Doc. Nos. 78-1506 and 78-1507, 78-2 USTC ¶9722 (10th Cir. Sept. 6, 1978)	20
United States v. Jenkins, 420 U.S. 358 (1975)	15

PAGE

United States v. Jorn, 400 U.S. 470 (1971) 11, 13, 15, 23
United States v. Lansdown, 460 F.2d 164 (4th Cir. 1972) 19n
United States v. Lorenzo, 570 F.2d 294 (9th Cir. 1978) 20
United States v. Mandel, Cr. 75-0822 (D.Md. 1977) 19n
United States v. Narciso (D.Mich. 1977) 19n
United States v. O'Connor, 580 F.2d 38 (2d Cir. 1978) 19n, 22n
United States v. Perez, 22 U.S. (9 Wheat.) 579 (1824) 9, 10, 16, 17, 18
United States v. Scott, 98 S.Ct. 2187 (1978) 8n, 11, 14, 15, 16
United States v. Washington, 447 F.2d 308 (D.C. Cir. 1970) 22n
United States ex rel. Webb v. Court of Common Pleas, 516 F.2d 1034 (3rd Cir. 1975) 15, 17, 20

Constitution, Statutes, Rules:

United States Constitution:
Fifth Amendment 2, 3, 4, 10
United States Code Title 26:
Section 7201 4
Section 7206 4
United States Code Title 28:
Section 1254(1) 2
Section 2101(f) 8

Other Authorities:

New York Times:
August 23, 1977, p. 16, col. 1 ..... 19n
August 24, 1977, p. 14, col. 1 ..... 19n

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ALLEN KLEIN,

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against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Allen Klein prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in this action on July 26, 1978.

Opinions Below

The opinion of the Court of Appeals (1a-25a)* is not yet officially reported. The opinion of the United States District Court denying Mr. Klein's motion to dismiss the in-

* Citations containing the suffix "a" refer to pages of the Appendix to this Petition; citations containing the prefix "JA" refer to pages of the Joint Appendix filed in the United States Court of Appeals for the Second Circuit, which will be filed as part of the certified record in this Court.

dictment (29a-35a) is reported at 442 F. Supp. 1164; the District Court's opinion granting Mr. Klein's motion for reargument and, on reargument, adhering to its original decision denying the motion to dismiss (36a-41a) is not officially reported).

Jurisdiction

This Petition for a writ of certiorari is filed within 30 days of the denial by the Court of Appeals on September 29, 1978 (26a-27a) of Mr. Klein's petition for rehearing, and suggestion for rehearing *in banc*, of the initial judgment of the Court of Appeals which had been entered on July 26, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Questions Presented

1. Was the Second Circuit correct in holding—in conflict with the reasoning of prior decisions of this Court and decisions in other circuits, as well as that very circuit—that the Fifth Amendment proscription against double jeopardy provides no protection against the second trial of a defendant, who endured a long and complicated first trial, followed by six days of jury deliberations, before the Trial Court aborted the proceedings by declaring a mistrial on the ground of jury deadlock, where

(a) the defendant expressly objected to the mistrial and requested that the jury be allowed to continue its deliberations;

(b) three jurors expressly informed the Trial Court that further deliberations could result in a verdict;

(c) the defendant proposed viable alternatives to mistrial—the propriety of which the Court of Appeals failed even to consider—which the Trial Court, without valid explanation or basis, declined to implement; and

(d) the defendant voluntarily testified at his first trial, thereby effectively relinquishing his Fifth Amendment privilege against self-incrimination and affording the prosecutor pre-trial discovery for use in a second trial?

2. Is a defendant denied the constitutional protection against double jeopardy where, over his objection, the Trial Court had aborted jury deliberations on the ground of jury deadlock, despite (i) the express statement by three jurors that further deliberations could result in a verdict, and (ii) the failure of the Trial Court to establish, by questioning of the jury, that the jury was hopelessly deadlocked?

3. Can a defendant be deprived of his constitutional right to obtain a verdict from the jury chosen at his first trial, by the Trial Court's discharge of the jury, over defendant's objection, without attempting to use proper and reasonable alternative procedures proposed by defendant?

Constitutional Provision Involved

The Fifth Amendment to the United States Constitution provides that

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in

actual service in time of War or public danger; *nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb;* nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation" (emphasis added).

Statement of the Case

The indictment against Mr. Klein (JA 8-12), filed on April 6, 1977, charged him with three counts of attempting to evade the payment of his federal income taxes and three counts of filing false income tax returns for the years 1970, 1971 and 1972, in violation of 28 U.S.C. §§7201 and 7206, respectively, with respect to monies he allegedly received from the sale of promotional phonograph records.*

The theory of the government's case was that Peter Benedetto (a/k/a Pete Bennett), an employee of ABKCO Industries, Inc., the company of which Mr. Klein was and still is the president, sold the promotional records and delivered most of the proceeds therefrom in cash to Mr. Klein (JA 22-24, 122-23, 130-31, 156-57). Both Mr. Klein and Mr. Bennett testified at the trial. Mr. Bennett testified that he sold promotional records on Mr. Klein's instructions and that he delivered most of the proceeds therefrom to Mr. Klein (JA 27, 28, 30). Mr. Klein testified that he did in fact receive cash from Mr. Bennett during the indictment years but that such cash represented the repayment of cash advances Mr. Klein had made to Mr. Bennett at the

* Promotional records are given by record companies to distributors, wholesalers and retail stores as an incentive to boost sales and foster public exposure of that company's records (JA 79a, 85a).

latter's request (JA 86). Mr. Klein expressly denied that he ever received any cash from Mr. Bennett from the sale of promotional records (JA 466).

The crucial issue for the jury therefore was who was telling the truth: Mr. Klein, who voluntarily surrendered his self-incrimination rights by testifying at the trial, or Mr. Bennett, who was a convicted felon awaiting sentence (JA 25-26, 32-34) and who, when faced with proof that proceeds of these illicit record sales had been traced to his own bank accounts, confessed to lying to the prosecutors in first denying that he had kept for himself any of these proceeds.

Mr. Klein's trial commenced on October 11, 1977 and ran approximately seventeen trial days, covering almost four weeks. Thirty-three witnesses were called—twenty-nine of them by the government—generating nearly 2500 pages of testimony and the receipt in evidence of approximately 450 exhibits.

Jury deliberations commenced on November 3, 1977 and continued for approximately six days, during which the jury delivered to the Trial Court more than 30 requests seeking (i) answers to a variety of relevant legal and factual questions, (ii) reading of testimony of various witnesses, and (iii) various documents received in evidence.

On the morning of the sixth day of jury deliberations, the Trial Judge, relying solely on the length of those deliberations, and over defendant's objection, effectively fixed a time limit for the conclusion of the deliberations by announcing that he would declare a mistrial if there was no verdict by that day's end (JA 437). Later that day, in re-

sponse to a note from the Trial Court inquiring as to whether it was deadlocked, the jury replied that three jurors believed that a *verdict was possible* if deliberations continued (JA 452). Despite this response, the Trial Court interpreted the jury's note to mean that the jury was hopelessly deadlocked (JA 452),* and proceeded toward discharge of the jury, over defense counsel's objections that the jury's response did not indicate a genuine deadlock.

The prosecutor, however, interjected that a mistrial could not be declared without affording defense counsel an opportunity to propose alternatives to a mistrial. The Trial Court, while rejecting as inapplicable the authority cited by the prosecutor for that proposition (JA 453, 455), permitted defense counsel to place proposed alternatives on the record. The Court clearly demonstrated, however, that it was merely going through a formalistic ritual and was determined to declare a mistrial, by stating that anything defense counsel might say "won't make any difference to me" (JA 455).

Defense counsel proposed two alternatives to a mistrial: (i) a supplementary charge on the meaning of "corroboration," and (ii) a strong *Allen* charge. The first alternative was in response to several questions from the jury which made clear that the jury was directing its attention to whether or not Mr. Bennett's allegations had been corroborated by other evidence: the jury had asked for the re-reading of testimony of witnesses claimed by the government to have corroborated Bennett (JA 319, 341, 378,

* Significantly, the Trial Court, only two days earlier had interpreted a substantially identical response from the jury on that day as meaning that the jury was not sure whether or not it could reach a verdict (JA 406).

395, 438); at the same time, the jury made clear that it did not understand the definition of "corroboration" by twice asking for further clarification of what evidence might be considered to be "corroborative" (JA 426, 431).

The second alternative—giving a supplemental *Allen* charge—was proposed to give the jurors, in the strongest possible terms, an analysis of the factors to be considered by each juror, as related specifically to this case, in attempting to reach a unanimous verdict, since the very weak form of modified *Allen* charge given by the Trial Court on the fifth day of deliberations (JA 414-15) had obviously not yet been successful.

The Trial Court, without valid explanation or basis, perfunctorily rejected both of these alternatives, and immediately declared a mistrial.

Mr. Klein thereupon moved the District Court (Broderick, J., to whom the case had forthwith been reassigned for retrial) for an order dismissing the indictment on the ground that retrial would violate his constitutional right against double jeopardy. The District Court, by order entered on December 23, 1977 (29a-35a), denied the motion and, by order entered on January 19, 1978 (36a-41a), while granting reargument, adhered to its original order denying the motion to dismiss.

By a decision entered on July 26, 1978 (1a-25a), the Court of Appeals for the Second Circuit (Port, D.J.; Feinberg and Meskill, CJJ., concurring) affirmed. Mr. Klein thereupon filed a petition for rehearing containing a suggestion for rehearing *in banc*. That petition was denied by orders entered on September 29, 1978 (26a-27a). On Octo-

ber 4, 1978, Mr. Klein filed a motion in the Court of Appeals for the Second Circuit, pursuant to Rule 41(b), F.R.App.P., seeking a stay of that Court's mandate pending his filing of a petition for a writ of certiorari with this Court. The Court of Appeals denied that motion by order entered on October 25, 1978 (28a). On October 26, Mr. Klein filed a petition in this Court with the Hon. Thurgood Marshall, pursuant to 28 U.S.C. §2101(f), seeking an order staying issuance of the mandate, or, if such mandate shall already have issued, staying all proceedings arising therefrom in the United States District Court for the Southern District of New York, pending his filing of this Petition and action by this Court thereon. That motion is currently pending before Justice Marshall.

The Decision Below

In affirming the District Court's denial of Mr. Klein's motion to dismiss, the Court of Appeals gave paramount weight to a trial court's discretion to declare a mistrial in putative hung jury situations. The Court held, in effect, that a defendant's valued right to have the jury empanelled at his first trial determine his fate is *always* subordinate in this context to "society's interest in giving the prosecution one complete opportunity to convict" (25a); and this is so even where, as here, the defendant affirmatively opposes the mistrial and, relying on specific facts in the record demonstrating the absence of genuine deadlock, requests that the jury be permitted to proceed with its deliberations. In so holding, the Court of Appeals, contrary to a recent opinion by this Court,* failed to differentiate between the constitutional double jeopardy protection ac-

* *United States* v. *Scott,* 98 S. Ct. 2187 (1978).

corded to a defendant as Mr. Klein, who affirmatively opposes the declaration of a mistrial, and other defendants who specifically request the mistrial or acquiesce in its declaration in order to terminate the proceedings in advance of any verdict.

The Court below paid lip service to this Court's mandate that jury deliberations be aborted only if it is determined that the jury is "genuinely deadlocked," and that this mistrial power "be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes," not "irrationally, irresponsibly or precipitately" [quoting from *United States* v. *Perez,* 22 U.S. (9 Wheat.) 579, 580 (1824) and *Arizona* v. *Washington,* 434 U.S. 497, 514, 515 (1978)]. Yet, in finding that the Trial Court had exercised "sound discretion" and had not acted "precipitately," the Court of Appeals relied on the following factors: (i) the fact that the jury had continued to deliberate for six days; (ii) the fact that the jury had carefully and painstakingly reviewed the record and had requested the reading, and, in some instances, the re-reading, of critical testimony (which the government contended was corroborative of Mr. Bennett), the reading of portions of the Trial Court's charge, and clarifying instructions on the critical issue of corroboration; (iii) the failure of the Trial Court's weak *Allen* charge to produce a verdict; (iv) the jury's use of the word "deadlock" in its replies to the Trial Court (wherein the jury also specifically represented that some jurors believed that a verdict could be reached, given an opportunity for further deliberations); and (v) the Court of Appeals' view that the record disclosed adequate consideration by the Trial Court of Mr. Klein's proposed alternatives to a mistrial (13a, 20a).

As we demonstrate below, none of these factors, whether viewed individually or collectively, justified the conclusion that the jury at Mr. Klein's trial had become "genuinely" deadlocked, warranting the declaration of a mistrial and the denial of Mr. Klein's valued right to have that jury return a verdict.

Reasons for Granting the Writ

The holding of the Court of Appeals is, in essence, that a trial court has almost unfettered discretion to abort jury deliberations, even though (a) the facts on which the trial court relies for its conclusion that the jury is deadlocked are at least as consistent with a finding that the jury is conscientiously continuing to deliberate towards a possible unanimous verdict, and (b) the trial court thereby rejects the defendant's objection to a mistrial, the opinion expressed by some jurors that a verdict remains possible, and procedures proposed by the defendant to assist the jury in reaching a verdict. This decision, if undisturbed by this Court, would, in the context of a jury deliberating following a trial, denude defendants of the Fifth Amendment "valued right," frequently emphasized by this Court, "to have his trial completed by a particular tribunal," and repudiate the limitations previously imposed by this Court on a trial court's exercise of power to declare a mistrial over the defendant's objection.

This Court held more than 150 years ago [*United States* v. *Perez*, 22 U.S. (9 Wheat.) 579, 580 (1824)], and in dictum has more recently repeated [*Arizona* v. *Washington*, 434 U.S. 497 (1978)], that the Double Jeopardy Clause

does not bar a retrial following the discharge of a deadlocked jury, *provided* the trial court's power thus to abort the trial is only "used with the greatest caution, under urgent circumstances, and for very plain and obvious causes," and then only if the jury is "*genuinely* deadlocked" (*id.* at 506n. 18, 509) (emphasis added).

However, this Court has never been called upon to explain the meaning of the foregoing limitation on the trial court's discretion to declare a mistrial in the context of a case in which some jurors have expressly informed the trial court that a verdict is possible if the jury were afforded an opportunity for further deliberation.

Moreover, this Court has also never been called upon to specify the manner in which a trial court must reconcile the exercise of its power to abort a trial for jury deadlock with two other principles of double jeopardy law also recently reaffirmed by this Court: (i) the "command to trial judges not to foreclose the defendant's option" to allow the first jury to continue deliberations—provided to him as part of "his 'valued right to have his trial completed by a particular tribunal' "—unless required to do so for reasons of "manifest necessity" [*United States* v. *Jorn*, 400 U.S. 470, 484-85 (1971); *accord*: *United States* v. *Scott*, 98 S. Ct. 2187 (1978)]; and (ii) the requirement that a trial court not act "precipitately" in declaring a mistrial—*i.e.*, that the trial court must consider and utilize all reasonable alternatives to a mistrial before aborting the trial over the defendant's objection [*Arizona* v. *Washington*, *supra*, 434 U.S. at 514-16; see also *United States* v. *Jorn*, *supra*, at 487].

This case clearly presents those issues.

As hereinafter discussed, each of the following bases warrants the granting of this Petition:

(i) conflict of the opinion below with relevant decisions of this Court;

(ii) conflict of the opinion below with decisions in other circuits as well as those in the Second Circuit;

(iii) important questions of constitutional law are at issue which have not been, but should be, resolved by this Court; and

(iv) the opinion below sanctioned conduct by the Trial Court so antithetical to the accepted and usual course of judicial process as to warrant intervention by this Court in the exercise of its supervisory powers.

I

The Opinion Below Is in Conflict With Decisions of This Court and of Various Circuits in Failing to Distinguish Between a Mistrial Declared Over a Defendant's Objection and One Declared Without Such Objection

The crux of Mr. Klein's appeal was that the mistrial was improperly declared over his clearly-voiced objection —after a long and complicated trial in which he waived his self-incrimination protection by testifying—notwithstanding (i) three jurors advising the Trial Court that they believed that additional time for deliberations could result in a verdict, (ii) Mr. Klein's request that a strong *Allen* charge be given, and (iii) his proposal of an additional instruction on the crucial issue of corroboration. These facts clearly distinguished Mr. Klein's appeal from the

run-of-the-mill case in which a defendant, eager to accept a mistrial due to jury deadlock, thereafter disingenuously claims double jeopardy protection as a bar to retrial. Indeed, no other case cited by the Court below, or by the government, presents the combination of circumstances—unambiguously raising the constitutional issue of the meaning of the protection against double jeopardy during the jury deliberations stage—of a defendant diligently asserting his right to receive a verdict from the deliberating jury and, in the face of statements from some jurors that the jury was not in fact hopelessly deadlocked, attempting to assist the jury in reaching a verdict by proposing viable alternatives to a mistrial.

The crucial importance of a defendant's objection to a mistrial declaration and of his insistence that the jury be permitted to continue its deliberations was emphasized in *United States* v. *Jorn*, 400 U.S. 470, 484-85 (1971), where this Court, in explaining the limitations on the use of mistrial, stated:

> "where the judge, *acting without the defendant's consent*, aborts the proceeding, the defendant has been deprived of his '*valued right to have his trial completed by a particular tribunal*' [citation omitted]. . . . *the defendant has a significant interest in the decision whether or not to take the case from the jury* when circumstances occur which might be thought to warrant a declaration of mistrial. . . . In the absence of [a motion by the defendant for mistrial], the *Perez* doctrine of manifest necessity stands as a command to trial judges not to foreclose the defendant's option until a *scrupulous* exercise of judicial discretion leads to the conclusion that the ends of public justice would not be served by a continuation of the proceedings" (emphasis added).

Only recently, this Court, in *United States* v. *Scott,* 98 S. Ct. 2187 (1978), reaffirmed the important distinction between a case where the defendant himself seeks to terminate the proceedings—where double jeopardy does not bar further prosecution—and a case where, as here, the trial is terminated over the defendant's objection—where the opinion in *Scott* suggests that double jeopardy does bar a retrial.

Indeed, the Solicitor General recently expressly concurred, in asserting to this Court that "the most significant factor in determining whether a second trial may be held . . . is whether the defendant has been deprived of his valued right to receive the verdict of the factfinder at the first trial. 'The important consideration, for purposes of the Double Jeopardy Clause, is that the defendant retain primary control over the course to be followed . . . .' After all, the valued right to receive the verdict of the factfinder at the first trial is the defendant's right." Memorandum (pp. 6-8) of the Solicitor General in support of the government's petition for certiorari in *United States* v. *Grasso,* Docket No. 76-1543, granted at 98 S. Ct. 3117 (1978).

The Court below virtually ignored this important factor —that the mistrial had been declared over the defendant's objection—in upholding the Trial Court's decision to abort the jury deliberations. Indeed, the Court of Appeals failed even to consider the effect of Mr. Klein's affirmative opposition to the mistrial in the two parts of its decision (II and III) where it discussed the standards governing the declaration of mistrial and the consideration to be given to available alternatives. Rather, the Court below treated the factor of the defendant's opposition to the declaration

of mistrial as an afterthought communicated by defendant's counsel following this Court's decision in *Scott, supra,* decided after argument below. In thus ignoring the crucial impact of the defendant's affirmative objection to the mistrial, the Court below put itself in conflict with this Court's mandate requiring that great emphasis be placed on the defendant's right to have his fate determined by the first jury where he affirmatively objects to the mistrial [*e.g., United States* v. *Scott, supra,* 98 S. Ct. at 2194-95, 2196, 2199; *United States* v. *Jorn, supra,* 400 U.S. at 484-85], and with similar decisions of various circuits [*e.g., United States* v. *Evers,* 569 F.2d 876, 878 (5th Cir. 1978); *United States* v. *Grasso,* 552 F.2d 46, 51 (2d Cir. 1977), *vacated and remanded,* 98 S. Ct. 3117 (1978);* *United States* v. *Gordy,* 526 F.2d 631, 635 (5th Cir. 1976); *United States ex rel. Webb* v. *Court of Common Pleas,* 516 F.2d 1034, 1046 (3d Cir. 1975)].

Moreover, in denying any effect to Mr. Klein's objection to the mistrial, the Court below misconstrued this Court's opinion in *Scott,* which had overruled the earlier decision in *United States* v. *Jenkins,* 420 U.S. 358 (1975) barring a retrial even though the mistrial had been declared at the defendant's own request. This misconstruction is apparent from the quotation by the Court below of only a part of the following sentence from the *Scott* opinion, omitting the italicized portion:

> "[*Jenkins*] placed an unwarrantedly great emphasis on the defendant's right to have his guilt decided by

* This Court vacated and remanded *Grasso* after granting certiorari on the government's petition, which posed the issue for review as whether double jeopardy could bar retrial where the "declaration of mistrial [was] neither objected to nor expressly concurred in by the defendant." That issue is not present here since it is undisputed that Mr. Klein opposed the mistrial declaration.

> the first jury empaneled to try him *so as to include those cases where the defendant himself seeks to terminate the trial before verdict on grounds unrelated to factual guilt or innocence.*" (*Scott* at 2191).

The isolation of the first half of the foregoing sentence from the second half materially alters the meaning. This Court did not, as the Court below suggests, minimize the importance of the defendant's right to have his fate decided by the first jury where, as here, the defendant objects to a mistrial. Indeed, after the above-quoted portion of the *Scott* opinion, this Court emphasized the crucial importance of the defendant's objection to aborting the trial, by distinguishing between the standard to be applied where the defendant does not object to the mistrial, and the situation where, as here, the defendant "had . . . insisted on having the issue of guilt submitted to the first trier of fact" (*Scott* at 2196).

The Court below attempted to support its construction of *Scott* as minimizing the importance of a defendant's objection to the mistrial, by arguing that otherwise it "would effectively remove any discretion of the trial judge to declare a mistrial," a result not intended by *Scott* (24a). But this is a straw-man argument since removing all discretion from the trial judge is neither argued by Mr. Klein nor a result inherent in holding that the Court below erred. Rather, it is petitioner's contention that, contrary to the view of the Court below, such discretion must be considered in the light of, and not be accorded greater weight than, petitioner's constitutional protection against double jeopardy—*i.e.*, where a defendant opposes a mistrial, the trial court must exercise its discretion "with the greatest caution," and declare a mistrial only on a finding of "urgent circumstances" (*Perez, supra* at 580) and "a high degree" of "necessity" (*Arizona, supra* at 506).

If these standards are to place any meaningful restraint on the trial court's exercise of its discretionary power to declare a mistrial, they must require, before the trial court can properly declare a mistrial over a defendant's objection, that there be *facts* conclusively establishing that the jury cannot possibly reach a verdict *and* that no viable alternatives to a mistrial can be attempted. Only then can the two interests noted in *Arizona*—a defendant's "valued right" to have his trial completed by the first jury (*id.* at 503, 504 n. 15) and "society's interest in giving the prosecution one complete opportunity to convict those who have violated its laws" (*id.* at 509)—be reconciled, particularly in light of this Court's statement in *Downum* v. *United States,* 372 U.S. 734, 738 (1963), that, to protect the constitutional right against double jeopardy, courts are required to "resolve any doubt 'in favor of the liberty of the citizen, rather than exercise what would be an unlimited, uncertain, and arbitrary judicial discretion' " in declaring a mistrial and requiring the defendant to stand trial before a second jury. See also *United States ex rel. Webb* v. *Court of Common Pleas, supra,* 516 F.2d at 1043 ("[i]n a close case, any doubts are to be resolved in favor of barring retrial").

II

The Decision Below, in Upholding the Discharge of the Jury Over Defendant's Objection and Despite the Express Statement of Some Jurors (and Other Circumstances Indicating) That Continued Deliberations Could Result in a Verdict, Failed to Comprehend This Court's Meaning in Requiring That a Jury Not Be Discharged Unless It Is *Genuinely* Deadlocked and Conflicts With Decisions of That and Other Courts

Arizona reaffirmed that the Double Jeopardy provision does not bar a retrial following the discharge of a "genuinely deadlocked" jury (434 U.S. at 509). If the word "genuinely" is to be given any meaning, particularly in the context of the requirement that a trial court must exercise "the greatest caution" in declaring a mistrial over a defendant's objection (*Arizona* at 506 n. 18, quoting from *Perez, supra* at 580), it must bar the declaration of a mistrial over the defendant's objection until a meticulous examination of the record warrants the conclusion that there is no possibility of reaching a verdict. At the very least here, it required appropriate interrogation of the jury to determine whether jurors might still change their vote on the basis of further deliberations,* and the reasonableness of the statement of the three jurors that further deliberations could result in a verdict. The Trial Court below failed to perform this duty, and the Court of Appeals erred in affirming the mistrial without such factual basis in the record. The discharge of the jury here without

* The Court below erred in holding that, to comply with the standard of "genuinely" deadlocked, "you just need some jurors to say, 'I will not change my mind' " (17a). Aside from the fact that the Trial Court never even asked whether any juror would be unwilling to change his vote, such unwillingness could indicate a genuine deadlock only if expressed by jurors on *both* sides of the vote.

scrutiny of the facts was particularly egregious in view of that express statement by three jurors that further deliberations could result in a verdict and the jury's continuing inquiries for relevant evidence and instructions.*

This Court, while emphasizing that a jury may not be discharged until it be determined to be "genuinely" deadlocked, has never defined the meaning of that term and when, and on what facts, a jury may be considered to be "genuinely" deadlocked. Resolution of that issue by this Court at this time is critical not only to prevent the denial of Mr. Klein's constitutional protection against double jeopardy, but also to assure greater uniformity among trial courts in interpreting the standard of "manifest necessity" as applied to the requirement that the jury must be found to be "genuinely" deadlocked.

The decision below, which cited no precedent in which a mistrial over a defendant's objection was sustained despite the view of some jurors that a verdict could still be

* Significantly, there was no screaming and hostility among jurors which might evidence a hopeless deadlock. *Cf. United States* v. *O'Connor,* 580 F.2d 38 (2d Cir. 1978), where, despite jury "screaming" and advising it was "hung" (*id.* at 40n. 4), the trial court declined to discharge the jury as deadlocked. In relying on the length of the deliberations here (13a), the Court below conflicted with *United States* v. *Lansdown,* 460 F.2d 164, 169 (4th Cir. 1972), and numerous cases in which a jury's inability to reach a verdict during a similar period was overcome by continued deliberations. *E.g.*: *United States* v. *Mandel,* Cr. 75-0822 (D.Md.) N.Y. Times, Aug. 23, 1977, p. 16, col. 1; *id.* Aug. 24, 1977, p. A14, col. 1 (12 days of deliberations); *United States* v. *Narciso* (D. Mich.), N.Y. Times, Aug. 23, 1977, p. 16, col. 1 (jury deliberated for 94 hours); *State Mutual Life Assurance Co.* v. *Arthur Andersen & Co.,* 71 Civ. 4036 (S.D.N.Y. 1977) (21 days of deliberations).

It also is difficult to understand the suggestion by the Court below that the jury's various relevant inquiries indicated it was deadlocked; as contrasted to no inquiries from a jury, they evidence the jury's continuing ability to discuss the issues. Nor, in the context of three jurors expressly opining that a verdict remained possible, was the jury's use of the word "deadlocked" in its note anything more than descriptive of the fact that it had not yet reached a verdict.

reached, conflicts with many prior decisions which have explicitly or implicitly suggested that, before a jury may be considered to be "genuinely deadlocked," the record must establish that all jurors agree that no verdict remains possible. Only last month, the Court of Appeals for the Tenth Circuit held that retrial was barred, following the trial court's discharge of a jury as deadlocked, even though the jury there had *sua sponte* reported it was "deadlocked" and the Court of Appeals had "no doubt as to the good faith belief of the trial judge that the jury was deadlocked." *United States* v. *Horn*, Doc. Nos. 78-1506 and 78-1507, 78-2 USTC ¶9722 (10th Cir. Sept. 6, 1978). These facts were held not to overcome the requirement that, before declaring a mistrial, the trial court must furnish "evidence" in the record that the jury was in fact hopelessly deadlocked, by interrogating the jury, *inter alia*, "if deadlocked, whether *all* members of the jury agreed that this was the situation." For, as the Tenth Circuit explained, "*then* there would have been a good basis for arguing that manifest necessity existed" to declare a mistrial (emphasis added). See also *United States ex rel. Webb* v. *Court of Common Pleas*, 516 F.2d 1034 (3rd Cir. 1975); *United States ex rel. Anthony* v. *Sielaff*, 552 F.2d 588 (7th Cir. 1977); *United States* v. *Lorenzo*, 570 F.2d 294 (9th Cir. 1978); *United States* v. *Beckerman*, 516 F.2d 905 (2d Cir. 1975); *United States* v. *Goldstein*, 479 F.2d 1061 (2d Cir.), *cert. denied*, 414 U.S. 873 (1973); *People ex rel. Stabile* v. *Warden*, 202 N.Y. 138 (1911); *People ex rel. Luetje* v. *Ketcham*, 45 Misc. 2d 802, 257 N.Y.S.2d 681 (Sup. Ct. Nassau Co. 1965).*

* The Court below suggested that language in some of these opinions, as to the "unanimous opinion of the jury" (*Webb*, *supra* at 1044) and that "*no* member of the jury ever suggested that any verdict

(footnote continued on next page)

III

The Holding Below That a Mistrial Can Be Declared Without Utilizing Reasonable Alternatives Proposed by Defendant Is Erroneous and Conflicts With Prior Decisions

The Trial Court refused to use defendant's proposed alternatives to a mistrial, without meaningful explanation or claim that they were factually or legally improper. Defendant's proposed instruction on the meaning of corroboration (JA 483, 522-23)—crucial to the jury's determination—specifically related to factual issues in the case, as compared to the more general definition previously given by the Court (JA 430-31); while the Trial Court conceded defendant's proposed instruction to be "correct" (JA 449), it rejected it as unnecessary, despite several inquiries from the jury indicating that it needed further guidance on the meaning of that term. The Trial Court likewise rejected defendant's proposed strong *Allen* charge (JA 512-17, 521),

was remotely possible" (*Goldstein*, *supra* at 1069) (emphasis added) did not mean that such unanimity of jurors was held essential. But it significantly ignored holdings barring retrial after a mistrial declared despite "[a] declaration even by a minority of the jurors that in their opinion a further deliberation by them would lead to an agreement" (*Stabile*, *supra* at 150) (interpreting a state statute with a less stringent standard than that required by federal case law). The Court below also ignored the express application of that unanimity requirement by a federal district court in refusing to discharge a jury in a civil case. *State Mutual Life Assurance Co.* v. *Arthur Andersen & Co.*, 71 Civ. 4036 (S.D.N.Y. 1977). Finally, the Court below also ignored the numerous cases in which the trial court was held to have properly refused to declare a mistrial where even one juror dissented from the other jurors' view that the jury was deadlocked. *E.g.*, *United States ex rel. Anthony* v. *Sielaff*, 552 F.2d 588 (7th Cir. 1977); *State* v. *Rudolph*, 332 So.2d 806, 813 (La.), *cert. denied*, 429 U.S. 982 (1976); *People* v. *Munguia*, 33 Ill. App. 3d 880, 338 N.E.2d 574 (1975).

directly related in part to the facts in the case, only because it was satisfied with the weak and more general form of *Allen* charge it had given two days earlier (JA 414-15); it ignored that such supplemental charge could have induced a verdict and, at worst, have been harmlessly ineffective.*

The Court below pointed to nothing in the record to support its limited and conclusory comment that "the record shows that [the Trial Court] adequately considered appellant's suggested alternatives to a mistrial" (20a). Its opinion, as the trial record, was devoid of any explanation why defendant's proposed alternatives were not proper, reasonable, fair and practical.

The treatment accorded by both lower courts to defendant's proposed alternatives is in conflict with controlling principles in opinions of this Court. Merely listening to a defendant's proposed alternatives, and then refusing, without explanation or valid basis, to use them, fails to conform with the "scrupulous exercise" required of a trial court

* The giving of a second *Allen* charge, after a jury has reported itself deadlocked, has been expressly approved by a number of courts. See *United States* v. *O'Connor*, 580 F.2d 38, 44 (2d Cir. 1978); *United States* v. *Washington*, 447 F.2d 308, 310 (D.C. Cir. 1970); *Fulwood* v. *United States*, 369 F.2d 960, 962 (D.C. Cir. 1966), *cert. denied*, 387 U.S. 934 (1967).

Moreover, defendant's proposed *Allen* charge would have corrected the instruction in the Trial Court's weak *Allen* charge that each juror should evaluate his judgment only "if . . . a large majority" disagrees (JA 414)—an instruction which may well have been supportive of inertia if the jury's division was not overwhelmingly one-sided, and which ignored a principle central to our criminal justice system: a jury must vote to acquit if a reasonable doubt exists. Defendant's proposed *Allen* charge, *inter alia*, made clear that the fact that other, also reasonable jurors (whether in the majority or not), hold a reasonable doubt is what should be considered by a juror who previously found no such reasonable doubt (JA 516).

before aborting the trial (*United States* v. *Jorn, supra,* 400 U.S. at 484-85), and the obligation of reviewing courts to "satisfy themselves that . . . the trial judge exercised 'sound discretion' in declaring a mistrial." *Arizona* v. *Washington, supra,* 434 U.S. at 514. *Accord*: *Dunkerley* v. *Hogan,* 579 F.2d 141 (2d Cir. 1978); *United States* v. *Evers,* 569 F.2d 876 (5th Cir. 1978); *United States* v. *Grasso,* 552 F.2d 46 (2d Cir. 1977), *vacated and remanded,* 98 S. Ct. 3117 (1978).

For example, in *Evers, supra,* the Fifth Circuit held that an appellate court must carefully scrutinize the trial court's rejection of possible alternatives to a mistrial and that appellate review in such situations "cannot be limited merely to ascertaining whether the trial judge went through the ritual of rejecting alternatives to mistrial" (569 F.2d at 879). So too in *Dunkerley, supra,* another panel of the Court below held that retrial was barred because the trial court had not indicated that that defendant's proposed "alternative . . . would be unfeasible, unfair . . . , violative of any state law or practice, or unreasonable under the circumstances" (579 F.2d at 147), and therefore the trial court's merely listening to the defendant's proposed alternatives did not comply with the required standard (*id.* at 147-48).

Likewise here, in view of the Trial Court's listening to defendant's proposed alternatives, after expressly stating that anything defense counsel might say concerning alternatives "won't make any difference" to the Trial Court's determination to declare a mistrial (JA 455), the decision below clearly elevated form over substance in concluding that this ritual constituted adequate consideration of alter-

natives by the Trial Court. The Court below thereby sanctioned conduct by the Trial Court so antithetical to the accepted and usual course of judicial process—particularly on a question of fundamental constitutional rights—as to warrant intervention by this Court in the exercise of its supervisory power.

Conclusion

For the foregoing reasons, this Petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 873—September Term, 1977.

(Argued May 2, 1978 Decided July 26, 1978.)

Docket No. 78-1052

UNITED STATES OF AMERICA,

Appellee,

against

ALLEN KLEIN,

Defendant-Appellant.

Before:

FEINBERG and MESKILL, *Circuit Judges,*
and PORT, *District Judge.**

Appeal from orders of the United States District Court for the Southern District of New York, Vincent L. Broderick, *Judge,* denying a motion to dismiss the indictment on the ground of double jeopardy, following the declaration of a mistrial.

Affirmed.

* Hon. Edmund Port, United States District Judge for the Northern District of New York, sitting by designation.

GERALD WALPIN, New York, N.Y. (Thomas J. DeZure, David C. Ash, Rosenman, Colin, Freund, Lewis & Cohen, New York, N.Y., of counsel), *for Defendant-Appellant.*

THOMAS E. ENGEL, Assistant United States Attorney, New York, N.Y. (Robert B. Fiske, Jr., United States Attorney for the Southern District of New York, Robert J. Jossen, Assistant United States Attorney, of counsel), *for Appellee.*

PORT, *District Judge*:

Appellant, Allen Klein, has appealed from two orders of Hon. Vincent L. Broderick, United States District Judge for the Southern District of New York, which denied a motion to dismiss the pending indictment against him, and after reargument adhered to the original ruling. Klein contends that a retrial after the sua sponte declaration of a mistrial, over his objection, by United States District Judge Charles M. Metzner[1] would violate his constitutional right not to be placed in jeopardy twice. Because our careful examination of the record convinces us that Judge Metzner, in declaring a mistrial in this case of a deadlocked jury, exercised the "sound discretion" mandated over 150 years ago by *United States* v. *Perez,* 22 U.S. (9 Wheat.) 579 (1824), we affirm.

1. Judge Metzner presided over Klein's trial. After the declaration of mistrial and the dismissal of the jury, the case was reassigned to Judge Broderick for further proceedings.

I

The six count indictment upon which Klein was tried charged him with attempted tax evasion for each of the years 1970, 1971 and 1972 in violation of 26 U.S.C. §7201, and making false statements on each of the income tax returns for those years in violation of 26 U.S.C. §7206(1). The indictment charged that the evasions and false statements arose out of Klein's failure to account for substantial cash he received from the sale of promotional phonograph records of the Beatles, whom he managed during those years. He is alleged to have received from the sale of such records $118,000, $55,000 and $52,000, respectively, for the years 1970, 1971 and 1972.

Although the case took 17 days to try, the decisive question to be resolved by the jury was: Should Pete Bennett,[2] the defendant's alleged accomplice, be believed?[3] If Ben-

2. Bennett's real name is Peter Benedetto. He has pleaded guilty to one count of a six-count indictment similar to Klein's and was awaiting sentence at the time of argument.

3. The defendant, on a number of occasions in his summation, pointed up the narrow scope to the jury:

> In my opening, I posed the issue at that time for your determination. I said then there was no dispute that promotional records had been obtained by Abkco. There was no dispute, because Pete Bennett had admitted it, that Bennett had sold them and had obtained money.
>
> The question for your determination, I said at that time, the single issue in the trial, was did Pete Bennett give that money to Klein or did he keep it for himself?
>
> . . . .
>
> The question in this trial comes down to: Is Pete Bennett's testimony such that you could find beyond a reasonable doubt that you believe it, that Allen Klein received this money?
>
> . . . .

(footnote continued on next page)

nett's testimony was accepted as true by the jury then the defendant's testimony of necessity could not be.

The government's case was produced mainly through the testimony of Pete Bennett. Klein was President and Chief Executive Officer of ABKCO Industries and Bennett was ABKCO's promotion manager. ABKCO received 5,000 copies of each new Beatles' album and single from Capitol Records for promotional purposes, not for sale. Testimony indicated that, contrary to custom, these promotional records were not marked or otherwise identified as promotional copies. Bennett testified that the records were sold, according to Klein's instructions, to wholesalers and distributors. The cash was then supposedly divided between the two, the greater part going to Klein.

In addition, the government called other witnesses who claimed to have seen large sums of cash pass between Bennett and Klein. Many of these witnesses also testified to Bennett's statements which inculpated Klein by referring to the source of this cash.

Klein couldn't in any logic have asked Bennett to sell these records for 35 cents each when he paid 54 cents each for them.

Common sense, ladies and gentlemen, mandates a conclusion that Bennett was lying and that Bennett sold these records for himself.

. . . .

Let me again summarize the evidence I have so far discussed. There is absolutely no evidence of any knowledge on Klein's part that Bennett was selling records and giving him the money unless, of course, you were to believe Bennett.

This brings us back again to the simple question: In order to convict Mr. Klein, you have to believe Bennett beyond a reasonable doubt. Can you do that?

. . . .

I would suggest the contrast is clear, that Bennett is a liar and cheat, while Klein is the one who has told the truth.

Klein took the stand in his own behalf and denied Bennett's charges. He conceded that he kept a large cash hoard in a private safe and that substantial amounts of money had passed between him and Bennett. He contended, though, that cash advances had been given to Bennett and Bennett, in turn, had merely repaid the cash advances. An accountant testified as to Klein's net worth and claimed that his investigation did not reveal the income alleged in the indictment.

A chronology of the jury proceedings from submission to discharge helps recreate the atmosphere under which Judge Metzner's decision to declare a mistrial was made. After 17 trial days, the case went to the jury on Thursday morning, November 3, 1977. Later that day, the jury requested certain exhibits and the reading of the testimony of witnesses Silver and Salvi (*sic*). Their testimony was offered in corroboration of Bennett's. The testimony was read to the jury and the exhibits provided. After six and one-half hours of deliberation, the jury was sent home. The next day, the jury deliberated for the entire day, on two occasions requesting further information.

On the morning of the third day of deliberations, Klein's entire cross-examination and redirect testimony were requested and read back. Later, further testimony was asked for, including some that had already been reread on the first day of deliberations. Toward the end of the day, Judge Metzner proposed to counsel that a note be sent into the jury asking whether a verdict was possible or if they were hopelessly deadlocked. Both counsel objected. Defense counsel contended that such a note was uncalled for as the jury was conscientiously deliberating. He fur-

ther argued that the proposed note would improperly suggest to the jury that it was deadlocked, and he requested the court to wait until the jury announced the deadlock. The government objected to the timing of the note. If the jury responded by stating it was deadlocked, the government intended to request an *Allen* charge. Accordingly, it asked that the inquiry wait until the following morning when, if necessary, an *Allen* charge could be delivered and the jury could retire forthwith for further deliberations. At 5:40 P.M. Saturday, Judge Metzner, denying a government request that the jury deliberate on Sunday, chose to do nothing and excused the jury until Monday morning at 9:30 A.M.

Monday began the fourth day of deliberations. That morning the jury requested that the court's entire charge be reread. In the afternoon, they requested, for the second time, the rereading of Silver's testimony along with other corroborative evidence. Late in the day, Judge Metzner again proposed inquiring about the chances for reaching a verdict. He noted that the issues presented to the jury were not overly complicated and contrasted the case to an SEC problem or a net worth tax case. Since the jury had already deliberated four days after a three week trial, Judge Metzner felt he was free to make this inquiry of the jury.

Defense counsel again objected to Judge Metzner's proposal, arguing that the deliberations were proceeding properly and that the judge's note was somehow coercive. The government again objected to an inquiry so late in the day since it would ask for an *Allen* charge should the jury indicate a deadlock. The defendant's counsel was

not prepared to join in the request for an *Allen* charge or object to it until he conferred with his client. The government further advised Judge Metzner that he must canvass the defendant for alternatives to a mistrial according to *United States* v. *Grasso*, 552 F.2d 46 (2d Cir. 1977), *vacated and remanded*, 46 U.S.L.W. 3792 (June 26, 1978).

Nevertheless, Judge Metzner sent the note in. It read: "Have you reached a verdict on any count in the indictment? If not, is there a possibility that you will reach a verdict on any count in the indictment if you continue your deliberations?" The jury responded: "Some feel there is no possibility of reaching a verdict on any of the counts as we appear to be deadlocked at this point. This, however, is not unanimous." Tr. 2841; JA 406. Judge Metzner then dismissed the jury until Wednesday, allowing them time off for Election Day.

On Wednesday morning, the beginning of the fifth day of deliberations, Judge Metzner decided to give the jury a modified *Allen* charge. He discussed this with counsel but rejected each of their respective proposals, choosing to give his own modified *Allen* charge which had been approved by this court in *United States* v. *Tolub*, 309 F.2d 286 (2d Cir. 1962). Later, after requesting a rereading of more corroborative testimony, the jury asked the court for clarification of the meaning of corroboration. The judge discussed his response with counsel and followed some of defendant's suggestions. His instructions were then read to the jury, only to be reread an hour and a half later following another note from the jury which requested the charge in writing. Wednesday's deliberations concluded without a verdict being reached.

The next morning the jury requested, for the third time, to hear the testimony of Silver concerning exchanges of money between Bennett and Silver. At noon they asked for Bennett's testimony concerning money passing between him and Silver. After hearing nothing further from the jury for the rest of the day, Judge Metzner called counsel to chambers shortly before 5 P.M. He noted that deliberations had lasted for six full days and that an *Allen* charge delivered Wednesday morning had produced no results. He suggested sending a second note into the jury to inquire about deadlock. Defendant continued to press his objections. He argued that a deadlock must be unanimous. Judge Metzner rejected this contention, stating that deadlock could result, instead, when some jurors determined not to change their minds. Defense counsel's request for further instructions on corroboration was also rejected.

A note prefaced by "At the end of . . . deliberations on Monday, you informed the court that you were deadlocked in your deliberations", was sent in and the jury responded as follows:

> Are you deadlocked in your deliberations?
> Yes.
> Have you reached a verdict on any count in the indictment?
> No.
> If you have not reached a verdict as to any count in the indictment, is there as possibility that you can reach a verdict as to any count in the indictment?
> Nine no; three yes.

The government then requested Judge Metzner to ask defense counsel, pursuant to *United States* v. *Grasso, supra,*

for alternatives to mistrial. The court did not find *Grasso* applicable but asked for suggestions anyway. In response, defendant offered no alternatives directly, taking the position that the jury was not deadlocked because the inquiry as to the status of their deliberations was initiated by the court. Defense counsel repeated his request for a further charge on corroboration and stated that his other suggestions, those requesting a different *Allen* charge and objecting to the judge's inquiries of the jury were already on the record.

Finally, on the basis of his conclusion that the jury was hopelessly deadlocked, Judge Metzner declared a mistrial and excused the jurors.

After the case was assigned to Judge Broderick for retrial, defendant moved to dismiss the indictment, arguing that double jeopardy barred a retrial. Judge Broderick concluded that, on the facts of this case—six days of deliberation, a modified *Allen* charge, and consideration of alternatives to mistrial—Judge Metzner properly exercised his discretion in declaring a mistrial on the basis of a hung jury. He further found that neither the court nor the government in any way acted to prevent the jury from reaching a verdict. The motion to dismiss was denied. The following day defendant moved for reargument. Judge Broderick granted the reargument but adhered to his earlier decision. Defendant has appealed from both of these orders.

II

The general principles by which the correctness of Judge Metzner's ruling must be judged were established long ago in *United States* v. *Perez,* 22 U.S. (9 Wheat.) 579 (1824). Courts have the power to declare a mistrial "whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated. . . . [T]he power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes" and in the exercise of "a sound discretion." *Id.* at 580. The parties do not question that a retrial, after a declaration of a mistrial meeting the *Perez* requirements, is not violative of the prohibition against double jeopardy in the Fifth Amendment. *Perez* wisely noted that "it is impossible to define all the circumstances, which would render it proper to interfere." *Id.*

Appellant Klein contends that the indictment against him should be dismissed because compelling him to stand trial after the declaration of a mistrial over his objection would place him in double jeopardy in violation of the protection afforded him under the Fifth Amendment. As *Perez* first held, and as we have stated on numerous occasions, this issue resolves itself into a question of whether or not Judge Metzner abused his discretion.

> Thus, the essential question in each case involving double jeopardy contentions after the declaration of a mistrial has been whether the trial judge abused his discretion in terminating the trial short of verdict.

United States v. *Castellanos,* 478 F.2d 749, 751 (2d Cir. 1973); *See also United States* v. *Beckerman,* 516 F.2d

905 (2d Cir. 1975); *United States* v. *Goldstein,* 479 F.2d 1061 (2d Cir.), *cert. denied,* 414 U.S. 873 (1973). The degree of discretion to be exercised varies, however, with the circumstances creating the manifest necessity.

Arizona v. *Washington,* 46 U.S.L.W. 4127 (February 21, 1978) is instructive in evaluating whether such abuse has occurred. The Supreme Court, in reversing the affirmance of the grant of a writ of habeas corpus on double jeopardy grounds, interpreted manifest necessity to require a "high degree" of necessity to justify a mistrial. *Id.* at 4130.

The mistrial granted by the Arizona Court giving rise to the double jeopardy claim was upon motion of the prosecution and resulted from an improper opening statement by defense counsel. The court explained that the high degree standard is more easily met in certain types of cases than others. "At one extreme are cases in which a prosecutor requests a mistrial in order to buttress weaknesses in his evidence." *Id.* In these cases, the strictest scrutiny is appropriate in reviewing the finding of manifest necessity.

> At the other extreme is the mistrial premised upon the trial judge's belief that the jury is unable to reach a verdict, long considered the classic basis for a proper mistrial. The argument that a jury's inability to agree establishes reasonable doubt as to the defendant's guilt, and therefore requires acquittal, has been uniformly rejected in this country. Instead, without exception, the courts have held that the trial judge may discharge a genuinely deadlocked jury and require the defendant to submit to a second trial. This rule accords recognition to society's interest in giving the prosecution one complete opportunity to convict those who have violated its laws.

> Moreover, in this situation there are especially compelling reasons for allowing the trial judge to exercise broad discretion in deciding whether or not "manifest necessity" justifies a discharge of the jury. On the one hand, if he discharges the jury when further deliberations may produce a fair verdict, the defendant is deprived of his "valued right to have his trial completed by a particular tribunal." But if he fails to discharge a jury which is unable to reach a verdict after protracted and exhausting deliberations, there exists a significant risk that a verdict may result from pressures inherent in the situation rather than the considered judgment of all the jurors. If retrial of the defendant were barred whenever an appellate court views the "necessity" for a mistrial differently than the trial judge, there would be a danger that the latter, cognizant of the serious societal consequences of an erroneous ruling, would employ coercive means to break the apparent deadlock. Such a rule would frustrate the public interest in just judgments. The trial judge's decision to declare a mistrial when he considers the jury deadlocked is therefore accorded great deference by a reviewing court.

Id. at 4130-31 (footnotes omitted).

The court then concluded that the case before it fell toward that end of the spectrum where the "trial judge's determination is entitled to special respect." *Id.* at 4131. In such a case, the trial judge's decision should be overruled only where a mistrial was declared irrationally, irresponsibly or precipitately. Finding that not to be the case, and in deference to "the public interest in having a just judgment reached by an impartial tribunal", *Id.* at 4131, the Supreme Court found the trial judge exercised "sound discretion" in declaring a mistrial.

Finally, the Court held that an explicit finding of manifest necessity was unnecessary. Since the record satisfactorily supported the trial court's decision, the absence of explicit findings did not make the decision constitutionally defective.

With this background in mind, we now turn to the various arguments raised by Klein, contending that the district court erred.

Klein urges as his initial ground for reversal that the jury was not in fact deadlocked and consequently he was deprived of the right to have his trial completed by that particular jury. His reliance on the dictionary definition of deadlock to support this contention elevates semantics above the realities of the situation confronting Judge Metzner. Since the resolution of each double jeopardy question turns on the particular facts of each case, we must examine the record to determine if, in fact, the jury at Klein's first trial was genuinely deadlocked. *See United States* v. *Goldstein, supra; United States* v. *Castellanos, supra.*

Deliberations had lasted six full days following a trial of about three weeks. The defendant's entire cross-examination and redirect testimony had been reread. Much corroborating testimony had been reread, some for a second and even a third time. The judge's entire charge had been redelivered along with further instructions concerning corroboration. Also, a modified *Allen* charge at the start of the fifth day of deliberations had produced no results. Finally, the jury itself had informed the court that it was deadlocked, first, in its own words, at the end of the fourth day and again after the sixth day of deliberations. After

these developments, Judge Metzner properly exercised his discretion in finding the jury deadlocked and declaring a mistrial. We recently reiterated that, where the record reveals a deadlocked jury, the discretion of the trial court to declare a mistrial will be upheld. *Dunkerley* v. *Hogan,* Docket No. 77-2138 (2d Cir. June 5, 1978), slip op. at 3328.

Notwithstanding this background, defendant argues that the jury was not genuinely deadlocked because the jurors were not unanimous in finding themselves deadlocked; only nine of the twelve indicated to Judge Metzner that there was no possibility of reaching a verdict. Although *United States* v. *Goldstein,* 479 F.2d 1061 (2d Cir.), *cert. denied,* 414 U.S. 873 (1973), and *United States* v. *Beckerman,* 516 F.2d 905 (2d Cir. 1975) suggest to the defendant that a deadlock is not reached until all twelve see no hope for a verdict, we do not agree.

This court found the declarations of mistrial in both *Goldstein* and *Beckerman* to be proper exercises of discretion on the part of the trial judges. Klein, nevertheless, by isolating certain phrases from the balance of the opinions in those cases, finds support for the rule of unanimity espoused by him. These quotes placed in proper context lend no such support.

In *United States* v. *Goldstein, supra,* after reversing the dismissal of the indictment on the ground that the declaration of a mistrial was consented to by the defendant, out of an "excess of caution", 479 F.2d at 1068, we dealt with the merits and held the grant of a mistrial was a proper exercise of discretion by the trial judge. In the course of reaching this conclusion, the opinion contrasted the abuse of discretion by the trial judge in *United*

States v. *Lansdown,* 460 F.2d 164 (4th Cir. 1972), with the reasonable and appropriate exercise of discretion by the trial judge in *Goldstein.* In *Lansdown,* immediately before the mistrial was declared, the judge had been told that the jury was "on the verge of a verdict" and that they "request[ed] an additional ten minutes of deliberations." *Goldstein, supra,* 479 F.2d at 1069. In *Goldstein,* the court, in the phrases relied on by Klein, pointed out that "[i]n this case, on the other hand, *no member* of the jury ever suggested that any verdict was remotely possible." *Id.* (emphasis added in appellant's brief). This comparison of the striking facts in *Lansdown* with those in *Goldstein* hardly establishes the rule of unanimity Klein seeks to impose.

The quotation from *Beckerman* is even less supportive of appellant's position. *Beckerman* also found that the declaration of a mistrial was not an abuse of discretion. The quotation is underscored and is from a footnote in which the trial judge sets out the reasons for the mistrial. These included a statement that "the Court interpreted the forewoman's statements as indicating that the jury would be unable to reach a verdict even with additional time; *no jury member declared* otherwise." *Beckerman, supra,* 516 F.2d at 909 n. 10. The fact that no juror took issue with the court's unannounced interpretation of the forewoman's equivocal statement is a far cry from the proposition that the declaration of a mistrial, absent a unanimous agreement on the part of the jurors that they cannot agree, is an abuse of discretion.

In support of his argument, defendant also cites *United States ex rel. Webb* v. *Court of Common Pleas,* 516 F.2d

1034 (3rd Cir. 1975) which granted habeas relief freeing defendant from a third trial following a declaration of mistrial based on deadlock. This reading of *Webb's* hold[ing] is less than objective. *Webb* did not apply a mechanical rule requiring unanimous deadlock. In fact, the Third Circuit eschewed any "rigid application of mechanical formulae." *Id.* at 1043 (footnote omitted). The court held that no manifest necessity for mistrial existed as the trial court had never consulted with counsel prior to dismissal of the jury, and the jury had never intimated that it would be unable to reach a verdict. The mistrial was declared solely on the basis of leading questions asked the foreman by the trial judge. "[T]here is no clear showing that the foreman's responses here necessarily represented the unanimous opinion of the jury, *or even that of a majority of the panel.* The record . . . does not furnish an adequate showing that it was the *collective* sentiment of the jury that they had reached an impasse." *Id.* at 1044 (footnotes omitted) (emphasis added). The jury responses to Judge Metzner, in contrast to *Webb,* indicated that "it was the collective sentiment of the jury that they had reached an impasse." *Id.*

We have held that a trial court acted within its sound discretion in declaring a mistrial even though the trial judge questioned only the jury foreman about deadlock and did not poll the entire jury. *United States* v. *Beckerman,* 516 F.2d 905 (2d Cir. 1975). We have also made it clear that the finding of manifest necessity cannot be based on the simple application of any formula, *United States* v. *Castellanos,* 478 F.2d 749, 752 (2d Cir. 1973), and that each case turns on its own facts. Likewise, even in cases which

have found that double jeopardy barred retrial, the other circuits have refused to apply any rigid formulistic rules. *See United States* v. *Gordy,* 526 F.2d 631 (5th Cir. 1976); *United States ex rel. Webb* v. *Court of Common Pleas, supra.*

"That seems to us to be the common sense of the matter; and common sense often makes good law." *Peak* v. *United States,* 353 U.S. 43, 46 (1957). The best answer to appellant's argument for unanimity of disagreement is Judge Metzner's common sense response to defense counsel that:

> A deadlock is two versions of approach. Some have one, others have the other . . . . [Y]ou don't need an agreement to disagree. You just need some jurors to say, 'I will not change my mind.' That is a deadlock.

Upholding the trial court's finding of deadlock based on the entire background of the jury's deliberations, rather than on a mechanical requirement of unanimity of disagreement, accords with the "great deference" owed the trial court under these circumstances. *Arizona* v. *Washington, supra,* 46 U.S.L.W. at 4131.

Defendant's next argument, that Judge Metzner improperly suggested to the jury that it was deadlocked, lacks support in the record. Judge Metzner's proposed original note to the jury was modified after discussion with counsel to eliminate any reference to a deadlock. A deadlock was suggested initially by the jury in its response to the first note. The second note reminded the jury they had previously reported that they were deadlocked and asked if they were still deadlocked, but also asked if there was any possibility of reaching a verdict

on any count. These cautious inquiries did anything but suggest an impasse to the jury. On the contrary, they kept open the possibility of reaching a verdict despite six fruitless days of deliberation.

Of the cases relied on by the defendant in which retrial after a mistrial was barred as violative of double jeopardy, only three involved hung juries. They are readily distinguishable from the circumstances confronting Judge Metzner. First, in *United States ex rel. Webb* v. *Court of Common Pleas, supra,* discussed earlier, the jury was discharged after less than one day of deliberations without any indication from the jury itself that it was deadlocked. The trial court acted solely on the basis of the foreman's responses to the court's leading questions. It is interesting to note that the discretion of the trial judge in declaring a mistrial in Webb's first trial was not faulted. On the fourth day of deliberations at Webb's first trial, the judge summoned the jury and made inquiries very similar to but not as innocuous as those made by Judge Metzner on the fourth day of Klein's trial. He asked the jurors "whether they were close to a verdict; whether they felt that given additional time they would be able to reach a verdict; and whether they felt themselves hopelessly *deadlocked.*" *Id.,* 516 F.2d at 1035 (emphasis added). He directed his questions to the entire jury, as did Judge Metzner, both in contrast to the judge on Webb's second trial who only solicited the foreman's opinion.

In *United States* v. *Gordy,* 526 F.2d 631 (5th Cir. 1976), total deliberations lasted only five and a half hours and

the jury had already returned a verdict on one count in the indictment. *Gordy* was the last trial of a very hectic term with sessions running late into the evening, and the record suggested that the trial judge discharged the jury so that he could catch a flight home. Finally, in *United States* v. *Lansdown,* 460 F.2d 164 (4th Cir. 1972), the jury was discharged despite the foreman's statement that they were on the verge of a verdict and a juror's request for another ten minutes of deliberations.

Our analysis persuades us that these cases are inapposite. In these cases the trial judge acted "precipitately", *Arizona* v. *Washington, supra,* 46 U.S.L.W. at 4132, justifying appellate relief in order to protect a defendant's "valued right to have his trial completed by a particular tribunal." *Id.* at 4129. In Klein, Judge Metzner exercised "sound discretion", *Id.* at 4132, in declaring a mistrial, to uphold "the public's interest in fair trials designed to end in just judgments." *Id.* at 4129 n. 11.

We have noted that "the 'classic example' of 'manifest necessity' is the discharge of a genuinely deadlocked jury." *United States* v. *Castellanos,* 478 F.2d 749, 751 (2d Cir. 1973). Since Judge Metzner properly concluded that the jury at Klein's first trial was genuinely deadlocked, we uphold his declaration of a mistrial.

III

The appellant argues that a retrial is barred because of the failure of the trial court to make explicit findings that there were no reasonable alternatives to a mistrial as required by *United States* v. *Grasso,* 552 F.2d 46 (2d Cir. 1977), *vacated and remanded,* 46 U.S.L.W. 3792 (June

26, 1978). The short answer to this claim is the holding of *Arizona* v. *Washington* that such findings are not constitutionally required.

In order to overcome this obstacle, appellant further argues that *Arizona* does not affect this court's ruling in *Grasso*. This suggestion is no longer valid in light of the Supreme Court's remand in *Grasso*. Appellant invites us to adopt the *Grasso* requirement in the exercise of our "supervisory power." We note that the Court has hardly discouraged use of such explicit findings. *See Arizona* v. *Washington, supra,* 46 U.S.L.W. at 4132. Moreover, whatever the extent of our supervisory power to require such findings after *Arizona,* we would encourage their use as an aid to appellate review of the trial court's exercise of discretion. But we find it unnecessary to further analyze the question of supervisory power, because we believe that the record shows that Judge Metzner adequately considered appellant's suggested alternatives to a mistrial. Even though Judge Metzner stated that he felt *Grasso* was not applicable, at the request of the government the defense was asked to place suggested alternatives to a mistrial on the record. The response was to rely on the requested charges on corroboration and the defendant's earlier requested version of the *Allen* charge. The objection to any inquiry by the court concerning a deadlock was also repeated.

Throughout the six days of deliberations, Judge Metzner consulted with counsel on all occasions before responding to jury requests or initiating contact with the jury. When Judge Metzner first proposed asking the jury if it was deadlocked, he reworded his inquiry, on defendant's suggestion, to omit the word deadlock, and deferred the inquiry to a later date. When he recharged on corroboration, in spite of defense counsel's acknowledgment that he needed time for research and was "shooting of[f] the top of [his] head", the judge adopted some of his suggestions. As a result of having researched the corroboration question, counsel submitted a written brief to the court before the next morning's session commenced. The judge considered it and ruled on it in the robing room, placing his reasons for denying the defendant's request on the record. The *Allen* charge given was not that requested by defendant, but neither was it the charge proposed by the government. The record clearly demonstrates consideration of all of defendant's proposed "alternatives", even if they were not ultimately adopted.

Although not cited, brief note should be taken to distinguish *Dunkerley* v. *Hogan,* Docket No. 77-2138 (2d Cir., June 5, 1978) (2-1, Moore, J., dissenting), decided after the argument of this case. *Dunkerley* granted a writ of habeas corpus on the ground that petitioner's state court retrial was barred by the double jeopardy clause as no manifest necessity had existed for the mistrial at his first trial. The trial court had declared a mistrial sua sponte over defendant's objection when he became sick during the trial; seven to ten days hospitalization was necessary. Since the majority found that the record failed to support adequately the trial judge's action including his failure to explore any alternatives, including the simple one of a continuance, it held that no manifest necessity for a mistrial existed. Here, however, the record demonstrates that Judge Metzner considered all the proposed alternatives

to a declaration of a mistrial. The "manifest necessity" for the mistrial is apparent.

The jury had been out for six full days; it had made approximately 30 requests for further instructions and testimony. It had heard crucial testimony read and reread; it had advised the court on two occasions that it was deadlocked; it deliberated for two full days after the delivery of an *Allen* charge. To have compelled further deliberations to resolve the relatively confined issue would have exhausted the jurors rather than the discussion. It is not unreasonable to join with Judge Metzner in his statement to the jury that,

> there is no point in asking you to continue with your deliberations because if you haven't reached a verdict in six days, I don't think you will reach it in seven, eight, nine or ten.
>
> . . . You have worked and obviously expressed among yourselves your convictions. You certainly have reviewed the evidence in six days, as can be seen by the repeated requests for the reading of testimony, portions of the charge and exhibits. . . .

Compelling further deliberations would certainly have invited "a significant risk that a verdict may result from pressures inherent in the situation rather than the considered judgment of all the jurors." *Arizona* v. *Washington, supra* at 4130.

We do not view the necessity for a mistrial differently than did Judge Metzner. However, even if we did, under the circumstances here, we would be obliged as a reviewing court to accord "great deference" to his decision, *Id.* at 4131, and affirm Judge Broderick's orders denying dismissal of the indictment.

IV

In a thinly disguised attempt to turn this appeal into a plenary review of his first trial, Klein raises a host of allegations of prosecutorial misconduct and erroneous rulings at his trial. He acknowledges that the denial of a motion to dismiss the indictment directly based on these charges is not an appealable order. *Abney* v. *United States,* 431 U.S. 651 (1977). The Supreme Court has held that the denial of a motion to dismiss an indictment on the grounds of double jeopardy is an appealable order, despite its interlocutory nature. *Id.* However, the Court also concluded that pendent claims which seek an indictment's dismissal are not reviewable short of final judgment. *Id.* at 662-63. *See also United States* v. *MacDonald,* 46 U.S.L.W. 4395 (May 1, 1978).

A review of the record herein demonstrates conclusively that Klein's mistrial was caused by a deadlocked jury and not by the other rulings objected to by appellant. If the rulings complained of by Klein recur at the second trial, they can "be reviewed effectively, and, if necessary, corrected if and when a final judgment results." *Abney, supra* at 663. The Third Circuit aptly stated in *United States* v. *Cerilli,* 558 F.2d 697, 701 (3rd Cir.), *cert. denied,* 434 U.S. 966 (1977):

> Although there are claims that the prosecution has engaged in various improprieties, the fact remains that the underlying source of the mistrial was not tainted by any overreaching, prosecutorial or otherwise.

V

Appellant urges by letter submitted after argument that the Supreme Court's recent opinion in *United States* v. *Scott,* 46 U.S.L.W. 4653 (June 14, 1978), suggests that, whenever a trial is terminated over a defendant's objections, the double jeopardy clause bars a retrial. Appellant concedes that the facts clearly distinguish *Scott* from this case. Nevertheless, he finds the language of the opinion supportive of his claim of double jeopardy. We disagree.

Klein points out that, in overruling *United States* v. *Jenkins,* 420 U.S. 358 (1975), the Court in *Scott* stressed that *Jenkins* had "placed an unwarrantedly great emphasis on the defendant's right to have his guilt decided by the first jury empanelled to try him. . . ." *United States* v. *Scott, supra* at 4654. Klein, however, continues to place great emphasis on the same right. *Scott* now permits a retrial after the lower court has dismissed an indictment, on defendant's motion, for reasons unrelated to guilt or innocence. The Court concluded that the defendant is "not relieve[d] . . . from the consequences of his voluntary choice", *Id.* at 4657, in taking the case away from his first jury.

The application of the defendant's suggestion would effectively remove any discretion of the trial judge to declare a mistrial. The only declaration of a mistrial that would not run afoul of the proscription against double jeopardy would be the one to which the defendant voiced no objection. Discretion would then lie exclusively in the hands of the defendant. This is a discretion not suggested by *Scott* or any other case. Like *Jenkins,* this

would place "an unwarrantedly great emphasis on the defendant's right to have his guilt decided by the first jury empanelled to try him." *United States* v. *Scott, supra* at 4654. It would completely ignore "society's interest in giving the prosecution one complete opportunity to convict those who have violated its laws." *Arizona* v. *Washington, supra,* 46 U.S.L.W. at 4130.

Scott in no way disturbed the ruling in *Arizona* v. *Washinton, Id.,* decided earlier this term. *Arizona* noted that a trial court has broad discretion to decide whether manifest necessity justifies the discharge of a deadlocked jury. "[C]ourts have held that the trial judge may discharge a genuinely deadlocked jury and require the defendant to submit to a second trial." *Id.*

The orders appealed from are affirmed.

Order Denying Petition for Rehearing

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-ninth day of September, one thousand nine hundred and seventy-eight.

Present:

Hon. WILFRED FEINBERG
Hon. THOMAS J. MESKILL
Circuit Judges
Hon. EDMUND PORT
District Judge

78-1052

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

ALLEN KLEIN,
Defendant-Appellant.

A petition for a rehearing having been filed herein by counsel for the defendant-appellant, Allen Klein,

Upon consideration thereof, it is

Ordered that said petition be and hereby is DENIED.

A. Daniel Fusaro,
Clerk

[Filed September 29, 1978]

Order Denying Rehearing *In Banc*

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-ninth day of September, one thousand nine hundred and seventy-eight.

78-1052

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

ALLEN KLEIN,
Defendant-Appellant.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the defendant-appellant, Allen Klein, and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

Irving R. Kaufman,
Chief Judge

[Filed September 29, 1978]

Order Denying Motion to Stay the Mandate

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 25th day of October, one thousand nine hundred and seventy-eight.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

ALLEN KLEIN,
Defendant-Appellant.

It is hereby ordered that the motion made herein by counsel for the appellant by notice of motion dated October 4, 1978 to stay issuance of the mandate pending determination of the petition for a writ of certiorari to the Supreme Court of the United States be and it hereby is DENIED.

/s/ WILFRED FEINBERG
WILFRED FEINBERG

/s/ THOMAS J. MESKILL
THOMAS J. MESKILL Circuit Judges

/s/ EDMUND PORT
EDMUND PORT, District Judge

Opinion of the District Court [442 F. Supp. 1164]

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[December 23, 1977]

77 Cr. 234 (VLB)

UNITED STATES OF AMERICA,

against

ALLEN KLEIN,
Defendant.

VINCENT L. BRODERICK, U.S.D.J.

On April 6, 1977, the Government filed an indictment charging defendant Allen Klein with income tax evasion and making false statements on income tax returns, in violation of 26 U.S.C. §§7201 and 7206(1). Defendant entered a plea of not guilty. The case was tried before a jury and on November 10, 1977, after seventeen trial days and six days of jury deliberation, Judge Metzner declared a mistrial due to failure of the jury to reach a verdict.

The case was reassigned to me and a retrial is scheduled for January 30, 1978.

Defendant Klein has moved for dismissal of the indictment on the grounds that retrial would violate his rights

under the Fifth Amendment to the United States Constitution not to be twice placed in jeopardy for the same offense.

The question here is, as it was in the seminal case of *United States* v. *Perez,* 22 U.S. 579 (1824), "whether the discharge of the jury, by the court, from giving any verdict upon the indictment, with which they were charged, without the consent of the [defendant], is a bar to any future trial for the same offense."

The trial court has authority to discharge a jury from giving any verdict, "whenever, in the opinion of the judge taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated." *Id.; See also United States* v. *Jorn,* 400 U.S. 470 (1971); *United States* v. *Grasso,* 552 F.2d 46 (2d Cir. 1977). It is clear that a declaration of a mistrial because of a hung jury does not of itself preclude reprosecution. *Downum* v. *United States,* 372 U.S. 734, 736 (1963); Comment, *Double Jeopardy and Reprosecution After Mistrial,* 69 Nw.U.L.Rev. 887, 896-97 (1975).

In resolving the question of "manifest necessity" for declaration of a mistrial, it is necessary to determine whether the trial judge considered all the procedural alternatives to a mistrial. *United States* v. *Jorn, supra,* 400 U.S. at 485; *United States* v. *Grasso, supra,* 552 F.2d at 52; Note, *Mistrial and Double Jeopardy,* 49 N.Y.U.L.Rev. 937, 945 (1974).

In this case, after four full days of deliberation by the jury, Judge Metzner inquired of the jury:

> Have you reached a verdict on any count in the indictment? If not, is there a possibility that you will reach a verdict on any count in the indictment if you continue your deliberations?

The jury's response indicated that although some jurors felt there was no possibility of a verdict, that view was not held by the entire jury:

> Some feel there is no possibility of reaching a verdict on any of the counts as we appear to be deadlocked at this point. This, however, is not unanimous.

Tr. 2841. At this point, the judge excused the jury for the day.

The following day, Judge Metzner delivered a modified *Allen* charge, advising the jurors of their duty to make a conscientious effort to reach a verdict.

One of the alternatives to declaration of a mistrial suggested by defendant had involved the suggestion to the Court of a different *Allen* charge for presentation to the jury, in which the judge would suggest that the jurors consider whether the very length of the jury's deliberation might raise a reasonable doubt:

> I have asked you to come back in here to talk with you a little further. You have been in your jury room in the process of deliberation for more than four days. That fact may itself be something for you to consider in reaching a verdict. As I previously instructed you, you must find the defendant not guilty, unless you are able to conclude that the government has fulfilled its burden of proving the defendant's guilt beyond any reasonable doubt.
>
> The substantial period of time in which you have conscientiously considered the issues and the facts should be considered by you to determine whether

> that, in and of itself, does not indicate that there is a reasonable doubt. After all, it is difficult to conceive that twelve honest, intelligent and reasonable jurors would be able to spend this amount of time in deliberations on the issues if you did not find that there were reasonable differences of opinion to consider.

Defendant's Memorandum Concerning the Jury's Continued Deliberations, pp. 1-2.

Judge Metzner did not give the *Allen* charge proposed by defendant, and defendant contends that his failure to do so inhibited the jury from reaching a verdict. There is no merit to this contention. The *Allen* charge read by Judge Metzner was proper in all respects, advising the jurors of their duty to attempt to resolve their differences, but emphasizing that jurors had a parallel duty to adhere to their conscientious view of the evidence. Judge Metzner's rejection of defendant's proposed *Allen* charge in no way constitutes a coercion of a mistrial or inhibition of a verdict.

After a note from the jury on the meaning of corroboration, Judge Metzner gave a charge on the definition of corroborating evidence. Defendant contends that the charge on corroboration was insufficient and that as an alternative to mistrial the Court should have read to the jury the charge on corroboration proposed by defendant. Defendant asserts that the failure to read the charge proposed by defendant constituted a failure to help the jury reach a verdict, and implicitly a hinderance to a verdict. However, Judge Metzner's charge on corroboration cannot be read as inhibiting a verdict; defendant

would be more candid if he acknowledged that his position is that the judge's refusal to use defendant's proposed charge was not an aid to a verdict of "not guilty." A judge has no responsibility to encourage a verdict of "not guilty"; to the contrary, the judge may not suggest by any means what verdict the jury should return, aside from instructing the jury on the standard of guilt beyond a reasonable doubt.

As Judge Metzner noted, defendant's objections to the charge on corroborating evidence do not relate to a claim of double jeopardy: they would normally be raised after conviction upon appeal from that conviction.

Late in the afternoon of the sixth day of jury deliberations, Judge Metzner inquired of the jury whether it was still deadlocked and whether there was a possibility of a verdict. Although defendant objected to use of the word "deadlock" in the question, the jurors themselves had used that term in their reply to Judge Metzner's inquiry on the fourth day of jury deliberations. In response to the note sent on the sixth day, the jurors indicated that nine jurors felt there was no possibility of reaching a verdict on any counts, while three jurors felt there was a chance of reaching a verdict:

> Are you still deadlocked in your deliberations?
>
> Yes.
>
> Have you reached a verdict on any count in the indictment?
>
> No.
>
> If you have not reached a verdict as to any count in the indictment, is there a possibility that you can reach a verdict as to any count in the indictment?
>
> Nine no; three yes.

(Tr. 2888).

Judge Metzner considered defendant's suggested alternatives to declaration of a mistrial, i.e., the delivery of defendant's proposed *Allen* charge, and defendant's suggested charge on corroboration, already discussed. Judge Metzner rejected these suggestions and over the objections of defendant, declared a mistrial.

A judge should declare a mistrial only when necessary due to extraordinary circumstances. *United States* v. *Perez, supra; Downum* v. *United States, supra,* 372 U.S. at 736. The determination of when there is necessity for declaration of a mistrial depends upon the circumstances of the particular case. *United States* v. *Perez, supra; Downum* v. *United States, supra,* 372 U.S. at 737; *United States* v. *Grasso, supra.* In this case there were six days of jury deliberation, reading of a proper *Allen* charge, consideration of proposed alternatives to a mistrial, and an indication by the jury that nine of twelve jurors felt they could not reach a verdict. Under these circumstances Judge Metzner, with some 18 years' experience as a trial judge, had the authority to conclude within his discretion that there was a hung jury, necessitating the declaration of a mistrial. *See Illinois* v. *Somerville,* 410, U.S. 458, 462 (1973), *quoting, Gori* v. *United States,* 367 U.S. 364, 368 (1961); *United States* v. *See,* 505 F.2d 845, 850 (9th Cir. 1974).

Judge Metzner's actions with respect to the jury were proper in all respects; he did not coerce the declaration of a mistrial, nor did he inhibit the jurors from reaching a verdict.

Defendant has also objected to various actions by the prosecutor and the judge which he contends inhibited a verdict. Defendant's contentions are not persuasive.

I find that neither Judge Metzner nor the prosecutor engaged in conduct which prevented a verdict. The declaration of a mistrial on the grounds of a hung jury was properly arrived at and is not a bar to reprosecution. The defendant's right under the Fifth Amendment not to be twice placed in jeopardy for the same offense has not been violated.

Defendant's motion for dismissal of the indictment is denied.

So Ordered.

Vincent L. Broderick
United States District Judge

Dated: New York, New York
December 22, 1977

Opinion of the District Court Granting Reargument

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[January 19, 1978]

77 Cr. 234 (VLB)

UNITED STATES OF AMERICA,

against

ALLEN KLEIN,
Defendant.

VINCENT L. BRODERICK, U.S.D.J.

In a memorandum order filed December 23, 1977, I denied defendant's motion for dismissal of the indictment on the ground that retrial would violate defendant's right under the Fifth Amendment to the United States Constitution not to be twice placed in jeopardy for the same offense. On December 27, 1977, defendant filed a motion for reargument of his motion for dismissal. Defendant's motion for reargument is granted. Upon reconsideration and for the reasons hereafter stated, I adhere to my order of December 23, 1977 denying defendant's motion for dismissal of the indictment.

In his motion for reargument and supporting papers, defendant does not reiterate claims presented in the original motion for dismissal. Rather, he contends that I

should reverse my order because, in the first trial, the government allegedly failed to produce 3500[1] material and

1. 18 U.S.C. §3500 (as amended 1977) Demands for production of statements and report of witnesses

(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) shall be the subject of subpena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of

(footnote continued on next page)

Appendix

Opinion of the District Court Granting Reargument

documents material to the defense under Rule 16(a)(1)(C), F.R.Crim.P.[2] requested by defendant. The government alleges that it provided defendant with all 3500 and Rule 16 material of which it was aware, and that, in any event, there was no prejudice to defendant by any nondisclosure.

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such statement by said defendant and his preparation for its use in the trial.

(d) If the United States elects not to comply with an order of the court under subsection (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

(e) The term "statement", as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means—

(1) a written statement made by said witness and signed or otherwise adopted or approved by him;

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement; or

(3) a statement, however taken or recorded, or a transcription thereof, if any, made by said witness to a grand jury.

2. Rule 16. Discovery and Inspection

(a) Disclosure of Evidence by the Government.

(1) Information Subject to Disclosure.

(C) Documents and Tangible Objects. Upon request of the defendant the government shall permit the defendant to inspect and copy or photograph books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the government, and which are material to the preparation of his defense or are intended for use by the government as evidence in chief at the trial, or were obtained from or belong to the defendant.

Appendix

Opinion of the District Court Granting Reargument

The standard for constitutional error arising from nondisclosure of 3500 material varies according to whether or not the defendant has requested specific material. In *United States* v. *Agurs*, 427 U.S. 97, 112-13 (1976), the Supreme Court held that if defendant has *generally* requested "all 3500" or "Brady" material or "all exculpatory material," there will be a finding of constitutional error and a requirement of a new trial where in the context of the entire case, nondisclosed material would have created a reasonable doubt of defendant's guilt in the minds of the jury:

> The proper standard of materiality must reflect our overriding concern with the justice of the finding of guilt. Such a finding is permissible only if supported by evidence establishing guilt beyond a reasonable doubt. It necessarily follows that if the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed. This means that the omission must be evaluated in the context of the entire record. If there is no reasonable doubt about guilt whether or not the additional evidence is considered, there is no justification for a new trial. On the other hand, if the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt.

This standard is applied irrespective of presence or absence of bad faith on the part of the government. *Id.* at 110.

However, "[t]he test of materiality in a case . . . in which *specific* information has been requested by the de-

fense is not necessarily the same as in a case in which no such request has been made." *United States* v. *Agurs, supra,* 427 U.S. at 106 (1976), *citing* Comment, *Brady* v. *Maryland* and The Prosecutor's Duty to Disclose, 40 U.Chi.L.Rev. 112 (1972) at 115-117 (emphasis supplied). The Court did not explicitly indicate what that test of materiality is. In the article cited, the author discusses various standards of materiality, the most expansive of which indicates that "if there is even a slight chance that a new trial would result in acquittal, the defendant's conviction must be reversed." 40 U.Chi.L.Rev. at 131. However, the Supreme Court to date has not explicitly defined the standard it approves in "specific request" cases, and it remains true today that "courts have found it impossible to define a materiality standard of general applicability." *Id.* at 125.

In the case before me, defendant would argue for the most expansive materiality standard applied in "specific request" cases. Defendant represents that he requested, after trial, confirmation that the government had produced all transcripts of grand jury testimony in the District of New Jersey by any government witnesses. The government prosecutor confirmed that, "as far as we are aware" all grand jury testimony was produced. Defendant has submitted affidavits to the contrary. It may be that defendant's request for "all grand jury testimony" is sufficiently specific to bring it within an expansive materiality standard. *But see Moynahan* v. *Manson,* 419 F.Supp. 1139, 1145 (D. Conn. 1976). However, this arguably specific request was made after trial as a request for con-

firmation; prior to trial, the Court directed the government to produce "all Section 3500 material." Thus, the materiality standard for "general request" cases set forth in *Agurs, supra,* may properly apply.

However, I need not reach this issue nor the application of the appropriate materiality standard. The sanction for nondisclosure under any standard contemplates a new trial,[3] and retrial is already scheduled in this case, albeit for a different reason.[4]

Defendant has presented no facts or arguments mandating dismissal of the indictment on grounds of double jeopardy.

So ORDERED.

Vincent L. Broderick
United States District Judge

Dated: New York, New York
January 18, 1978

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3. This rationale applies also to defendant's Rule 16 claims, for retrial is a permissible sanction for nondisclosure of Rule 16 material. While the sanction of dismissal of the indictment might apply in Rule 16 cases where the government failed to disclose "obviously exculpatory material," this is not the situation in the case before me. *See U.S.* v. *Leta,* 60 F.R.D. 127, 130 (M.D. Pa. 1973).

4. The retrial, scheduled to commence January 30, 1978, was initiated by the government after a mistrial due to failure of the jury to reach a verdict. While the typical case involves retrial after conviction, I find no compelling reason to presume a different sanction where the first trial resulted in mistrial.

Although one could speculate that a failure by a jury to return a verdict after extended deliberation suggests that at the time when mistrial was declared some members of the jury may have inclined toward conviction and some members of the jury may have inclined toward acquittal, no one can reasonably conclude that the jury itself had reached, or was about to reach, either of those results. The proceedings ended by the declaration of a mistrial are commonly viewed as a nullity. I find that this approach best serves the end of justice.